Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

94-123

In the Matter of	)	
	)	
Amendment of Section 73.658(k) of the Commission's Rules to Delete the "Off-Network" Program Restriction	)	MMB File No. 920117A
	)	
Amendment of Section 73.658(k) of the Commission's Rules to Delete the "Off-Network" Program Restriction	)	MMB File No.870622A
	)	
Constitutionality of Section 73.658(k) of the Commission's Rules ("Prime Time Access Rule")	)	MMB File No. 900418A
	)	

REPLY COMMENTS OF THE MEDIA ACCESS PROJECT

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SUMMARY

MAP believes no action on PTAR is necessary. Its opponents have fallen far short of their burden of demonstrating that the elimination of the rule would serve the public interest. PTAR and its integral off-network rule have worked, and continue to work, to provide access to new and diverse programming from new and diverse sources to the benefit of television viewers. If the Commission finds it necessary to reexamine PTAR, it should do so only after it has had an adequate opportunity to evaluate the effect of the 1995 sunset of the financial interest and syndication rules.

It is irrelevant to argue, as PTAR's opponents do, that the rule did not meet the goals the Commission set out in 1970. PTAR has fueled the growth of a vibrant independent television sector and first-run syndication industry; the net result has been that the public has access to more voices providing more diverse programming. Market dynamics, not the rule itself, explains the relative paucity of first-run producers today.

A number of parties reiterate the claim that the growth in the number of outlets for video programming renders PTAR unnecessary. But as Congress has found, no new technology has as yet challenged over-the-air broadcasting as the primary real-time, day-to-day, minute-to-minute source of information on local and other issues of public importance. The recent Supreme Court decision in *Turner* has affirmed these findings. The Fox network has made inroads, but the three major networks vastly dominate in influence, experience and viewership. To the extent that Fox is advantaged because of its exemption from PTAR, the logical solution is for the Commission to reconsider the exemption, not to throw out the rule.

The Coalition to Enhance Diversity's argument that the off-network rule has adverse

economic consequences is self-serving; the fact is that, if the off-network prohibition were repealed, the price for that programming would go up. The Coalition suggests that repeal will permit independents to bid for first-run access programming. Its concern is misplaced - independent stations want to program off-network programming in access to attract new audiences, and first-run syndicators want exclusive access to network affiliates and their guaranteed audiences.

Contrary to its original contention that video outlets are abundant, the Coalition complains that a "decline" in video outlets makes it harder for off-network producers to maximize their profits. But these producers can sell their programs to cable, satellite and independent stations. The real problem is that they cannot realize as much revenue as they can if they can sell it to a network affiliate. To the extent that there is a "glut" of off-network programming, there is no guarantee, with or without the off-network prohibition, that a show which was successful on-network will be equally so in syndication. The Coalition's argument that the off-network prohibition leads to lower cost, lower quality programming overall seems incredible when producers and networks can maximize their profits for the other 23 1/2 hours of the broadcast day.

First Media renews its argument that PTAR is unconstitutional. But the recently decided *Turner* case slams the door on that claim; the decision unequivocally reaffirms the regulatory principles underlying PTAR, that trustee obligations can and should be imposed on broadcasters in exchange for the exclusive use of scarce broadcast spectrum.

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REPLY COMMENTS OF THE MEDIA ACCESS PROJECT

Media Access Project ("MAP") respectfully submits reply comments in the above proceedings. The parties calling for the elimination of the Prime Time Access Rule ("PTAR") and/or the related "off-network" prohibition have not met their burden; they have fallen far short of demonstrating that the public interest would be served thereby. Rather, it is painfully obvious that their "public interest" rhetoric is a thinly veiled attempt to advance mere economic self-interest in seeing the regulation eliminated.

First Media's continued assault on PTAR on First Amendment grounds is rendered totally baseless by the recent Supreme Court decision in *Turner v. FCC.* The *Turner* case strongly reaffirms that it is the viewers' First Amendment right to have access to diverse sources of information which is "paramount." Under this analysis, the public trustee concept of broadcast regulation and the scarcity rationale upon which it is based provide powerful justification for retaining rules which, like PTAR, promote the goals of the First Amendment.

I. The Commission Must Wait to See the Effect of The FISR Sunset Before It Can Take Any Action on PTAR.

MAP believes that no action on PTAR is necessary. PTAR has worked to provide access to new and diverse programming from new and diverse sources to the public's benefit, and continues to do so. However, should the Commission find that a reevaluation of PTAR is warranted, MAP urges the Commission to wait until it can adequately assess the impact of the sunset of the financial interest and syndication rules ("FISR") on the programming market.

CBS and NBC exhort the Commission not to await the forthcoming sunset of the FISR before commencing a notice of proposed rulemaking on PTAR. CBS Comments at 11-13; NBC Comments at 24-25. Specifically, CBS points to the Commission's refusal to reconsider PTAR in the latest FISR proceeding as precedent for considering the two provisions separately. *Id.* at 12 quoting *Evaluation of the Financial Interest and Syndication Rules*, 5 FCC Rcd 6463, 6469 (1991) ("*NOPR*").

The two networks continue to adhere to their "exceedingly narrow view of PTAR." *Evaluation of the Financial Interest and Syndication Rules*, 7 FCC Rcd 8270, 8298 n.74 (1992) ("*MO&O*"). They miss the point - the Commission declined to revise PTAR in the context of the FISR proceeding not because it thought PTAR was irrelevant, but precisely because it recognized the linkage between the two. The Commission's severance of the issues was a deliberate judgment that it was unwise to change both of these complementary provisions at the same time. Indeed, in the *NOPR* upon which CBS relies, the Commission noted at length the connection between the two rules

> We note, however, that the PTAR was adopted at the same time as the financial interest and syndication rules, and that the rules together were intended to foster "[a] healthy syndication industry composed of independent producers." We also observe that the

> PTAR was specifically designed to provide an outlet for independent productions and thereby to enhance diversity in program production.

NOPR, 5 FCC Rcd at 6469. The Commission then solicited comment on a half a dozen detailed questions on the effect of the modification of FISR on PTAR. *Id.*

Later, on reconsideration in the same proceeding, the Commission reaffirmed the linkage while rejecting CBS' request that the Commission revisit its limits on network syndication participation in the first run market:

> **[U]ntil we have had some opportunity to witness network behavior in the areas we have relaxed, we remain concerned about the effect of network participation in first run syndication on the objectives of PTAR, 47 CFR §73.658(k).******We are sensitive to concerns that allowing the networks to participate in first-run syndication may compromise the accomplishments of PTAR, especially if network syndicators affect the ability or incentive of broadcast stations to schedule independently produced programming during one of the four hours of prime time.

MO&O, 7 FCC Rcd at 8299. [Emphasis added.][1]

Thus, as the Commission has itself recognized, the fate of FISR is integrally related to the fate of PTAR. Therefore, should the Commission decide that a reevaluation of PTAR is necessary, it should commence such a proceeding only when it has had an opportunity to evaluate the effect of network participation in the first run syndication market on affiliates, independent

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[1]*See id* at 8298 n. 74. In denying CBS' request that the Commission reverse its previous ruling that "network produced first-run programming shall be considered network programming for purposes of the prime time access rule," the Commission stated "we think that CBS takes an exceedingly narrow view of PTAR, which is designed to promote alternative sources of non-network programs for both affiliates and independent stations. Even if network produced first-run programs come within PTAR's access hour limitations, network entry into the first-run market could be damaging to the extent the networks diminish available non-network sources of programming for the prime time."

stations and other independent producers.[2] Rather than "needlessly complicate" matters, as CBS claims, CBS Comments at 13, a more cautious approach would conserve Commission resources and provide the best means by which to decide whether the demise of FISR warrants the retention of PTAR.[3]

II. Whatever its Intended Goals, the Prime Time Access Rule and the Integral Off-Network Rule Have Resulted In a Diversity of Voices and a Diversity of Programming to the Public's Benefit.

PTAR's opponents spend a good deal of time arguing that the rule did not accomplish the goals the Commission set out in 1970, and that as a consequence, it does not serve the public interest. Coalition to Enhance Diversity Comments at 5 ("Coalition); NBC Comments at 12-15. But, as MAP stated in its initial comments, the relevant question for the Commission is *not* whether PTAR and the off-network rule have accomplished those specific goals. Rather, the questions for the FCC are whether and how PTAR and the off-network rule have benefitted the public for whatever reason, and whether it continues to do so. *See* MAP Comments at 6. MAP believes that the answer to both questions is "yes."

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[2]MAP agrees with Viacom that the "1995 finsyn review will be too early to be of any significant value with respect to even making proposals for modifications of PTAR. The Commission should wait until these effects are known before proposing any changes to PTAR." Viacom Comments at 7. Viacom suggests that it will not be until spring of 1998, "at the earliest" that there will be "sufficient network entry into the off-network syndication marketplace to allow the Commission to gauge the effects of that entry." *Id.* [Footnote omitted.]

[3]NBC states that "[t]he Commission delayed the final repeal of FISR in order to monitor network behavior in the program acquisition marketplace. There is no reason to subject PTAR to a similar delay." NBC Comments at 24. But, as discussed above, network behavior in the program acquisition marketplace so affects PTAR that it is an equally good reason for the Commission to delay reexamination of that rule.

A. The Alleged Failure of PTAR to Meet Its Goals is Attributable to the Realities of the Marketplace and not to the Operation of the Rule.

In arguing that PTAR and the off-network rule are no longer necessary, the Coalition and NBC assert that the program diversity the Commission envisioned for PTAR did not take place, and that three companies and essentially four shows dominate 93% of the access period. Coalition Comments at 5; NBC Comments at 12-14. The Coalition also asserts that the local programming the Commission envisioned has not blossomed. Coalition Comments at 5.

But even assuming, *arguendo*, that these contentions were true, it is also appropriate to ask "why?". It is equally important to consider whether repeal of PTAR and/or the off-network rule would create a positive difference. The small number of producers of access fare is attributable to the cost of making first-run programming, not to the effect of PTAR and the off-network rule. Unlike prime-time network shows, there is no network providing license fees to a first-run producer to help with production costs. Moreover, the risks of producing access programming are enormous because, unlike off-network programming, first-run syndicated programming does not have a built in audience. *See* King World Comments at 8.[4]

But even if there is not a huge number of different first-run program producers, PTAR and the off-network rule have still resulted in more program diversity from more different sources than there would have been without the rule. In addition to the "big three" syndicators, 7% of

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[4]It is more than likely that four shows dominate the access period because they make the most money for stations during the access period, not because they are the only programming available to broadcasters. As King World notes, "of 38 new series proposed for launch in the 1990-91 season, only 12 were successfully cleared and only 2 made it into their second year; in 1991-92, the number of proposed new shows dropped to 16, of which only 7 were launched and only 2 made it into the second year; in 1992-93 only 15 shows were proposed for launch, or which only 10 were launched and only 3 made it into their second year in syndication." King World Comments at 6.

access fare is produced by others. And the mere existence of PTAR gives the opportunity to new entrants.[5]

If the off-network restriction were to be repealed, the result would be decreased, not increased, source diversity. As King World notes, new and established first-run producers will not take the risk of spending millions of dollars on a program without the guarantee of prime time access to network affiliates in the top 50 markets. These producers would be dependent on access to independent stations, which do not have the audience to make such programming profitable. King World Comments at 5-10. As first-run producers drop out, off-network programming would once again dominate the access period, resulting in a net *loss* in source diversity.[6]

It is perhaps worth pointing out that, at the time the rules were adopted, public interest

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[5]For example, Grove Television Enterprises will be a new entrant in the first-run syndication market this fall. It will launch two first-run programs this fall, and has two in development for 1995. "Space Power: Revamped Grove TV Aims for Next Level," Electronic Media, July 11, 1994 at 3.

[6]NBC asserts that "by focusing on the network/non-network dichotomy...PTAR undermines its primary goal" of increasing "source" diversity. NBC comments at 16-17. NBC uses the twin examples of "Entertainment Tonight," (a first-run program produced by Paramount) and "Cheers," (an off-network program produced by Paramount), and argues that "[s]ince Paramount produces both shows, how has source diversity been enhanced?" *Id.* at 17. Without the off-network restriction, NBC concludes, "major studios such as MCA and independent producers such as Carsey/Werner and Shukovsky/English, would be able to compete against King World, Viacom/Paramount and Fox..." which would add diversity. *Id.* But this argument ignores the purpose of PTAR. PTAR is intended to permit unfettered access to network affiliates for non-network programming. Therefore, the focus of the rule is properly on the entities that would have an incentive to deny access, namely, the networks. This has led to "source diversity" that did not exist before the existence of the rule. The producers NBC identifies are eligible and able to compete during the access period with the "big three," as long as their programming is not "off-network." That these producers have instead chosen the security of producing their programs for network prime time is not attributable to PTAR.

groups had called upon the Commission to provide for stronger incentives for locally originated programming than were ultimately adopted. Based on its desire to afford maximal editorial discretion to broadcasters, the FCC chose not to adopt these requests *See e.g., Second Report and Order,* 50 FCC2d 829, 856 (1975). That policy choice, right or wrong, explains the dearth of local programming. It is ironic that at the same time it criticizes PTAR for not creating increased local programming, the Coalition admits that "[a]lthough the Commission requires all broadcast licensees to meet certain public interest programming obligations, no commercial station...is required to devote time to "noncommercial or other unprofitable programming****Like other stations...independents air public-interest type programming when it makes financial sense to do so." Coalition Comments at 23. Thus, although PTAR gave local stations the ability to do local programming during prime time, they have opted for the programming that they know will bring in the largest audiences and profits, typically game shows and so-called "reality" programming.[7] That these stations have exercised their discretion in that way is not a consequence of the regulation.

B. PTAR Has Resulted In More Voices From More Different Sources To The Public's Benefit.

As MAP has argued in its comments at 5-8, in combination with FISR, PTAR and the off-network rule fueled the growth of a vibrant independent television sector and first-run

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[7]CBS complains that the off-network prohibition "perpetuate[s] by government fiat a lucrative prime time enclave on major market network-affiliated stations for the game shows and 'reality' programming-...which have become the staples of access period programming." CBS Comments at 10. To the extent that CBS is inviting the Commission to make a qualitative judgment about the independent programming that has developed as a result of PTAR, it is not the role of the Commission, or anyone else, to make such content-based judgments. *See* MAP Comments at 5-6.

syndication industry. The net result has been that the public has access to more voices providing more diverse programming.

Several of the commenters dismiss the effect of PTAR on first run syndication and independent stations. Henry Geller wrongly attributes the growth of independent stations solely to cable. Comments of Henry Geller at 4. As to first-run programs, NBC argues that "the success of these programs cannot be attributed to PTAR" but is "attributable to the strength and number of independent stations that clear the programs across the country." NBC at 11 n.19.

There is little doubt that cable television has helped many independent stations by expanding their audience reach. But the economic benefits of such enhanced coverage can be realized only if the stations' programming is adequately attractive. PTAR and the off-network rule gave independents the necessary access to familiar and popular off-network programming. This drew important new audiences and, as a result, new advertisers as well. First-time viewers enticed by access programming proved more likely to stay tuned to that station to watch more of its prime time fare. Independents also capitalized on the access hour audiences to cross-promote other programming. *See* MAP Comments at 7.

The ultimate consequences of PTAR and the off-network rule have been that revenues generated from off-network fare have enabled independents to purchase additional and better prime time programming, most of which is first-run syndicated programming. Thus, NBC is only half correct - while the success of first-run syndicated shows is indeed partially "attributable to the strength and number of independent stations" this "strength and number of independent stations" is itself the direct result of the benefits of PTAR and the off-network restriction.

The Coalition and Henry Geller argue that "PTAR was never intended as a means to

subsidize or protect independent station operation." Henry Geller Comments at 5; *see* Coalition Comments at 20. This is revisionism: PTAR was explicitly intended provide a benefit "in an increased supply of programs for independent...stations." *1970 Report and Order*, 23 FCC2d 382, 395 (1970). The Commission specifically noted that this new programming would help "the still-struggling UHF independents upon which Congress and the Commission have relied for a fully competitive nationwide television broadcast service." *Id.* at 394.

It would be more accurate to say that assisting independents was not a primary or exclusive objective of PTAR. But this fact merely underscores the larger point: even assuming, *arguendo*, that PTAR does in some way subsidize or protect independent stations beyond what was intended by the Commission, this consequence has benefitted, and continues to benefit, the public. That is the only relevant consideration here.[8]

III. Changes In the Video Marketplace Do Not Reduce the Need For the PTAR and the Off-Network Rule to Preserve Diversity of Voices and Programming.

A number of parties have reiterated the claim advanced in the three original petitions, that the growth in the number of outlets for video programming lessens the dominance of the three major networks, and therefore renders PTAR and the off-network rule unnecessary. *E.g.*,

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[8]The Coalition asserts that "it cannot be substantiated" that independent stations use the revenue from off-network programming to finance public interest-type programs. Coalition at 22. But two paragraphs later, it states that "[l]ike other stations...independents air public interest type programming when it makes financial sense to do so.....Independent station newscasts have mushroomed in recent years because there is revenue to be earned in delivering what only a local outlet can provide - local news." Coalition Comments at 23. [Footnote omitted]. The Coalition does not say where the money to produce these expensive local newscasts came from in the first place. While it may not be provable with absolute certainty, the fact that off-network revenues are an independents' main source of revenue, *see* Association of Independent Television Stations ("INTV") Comments at 36-37, would lead to the inevitable conclusion that these revenues were the primary source of funding for these news programs. *Id.* at 39 n. 97.

NBC Comments at 7-10; Coalition Comments at 2-4; CBS Comments at 8-9.

MAP has already addressed this argument. *See* MAP Comments at 8-12. The flaw in this reasoning is that it falsely equates thus far unrealized potential with actual success. Many of the new program sources to which the commenters refer do not substitute for broadcasting because they lack its reach to, and influence on, the American public, especially on local issues. Direct Broadcast Satellite and video dialtone are just now leaving the experimental stage and beginning entry into the market. Years after start-up, wireless cable has thus far achieved but a very minor presence of a mere 400,000 television households (compared to nearly one hundred million for the networks). Video Cassette Recorders are not a meaningful source of *new* program diversity, especially for material which is issue-oriented or of a time-sensitive nature. Rather, VCRs merely record or replay what is already available on other outlets.

That over-the-air broadcasting is not replaced by new video technologies is bolstered by Congress' findings under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the newly issued Supreme Court decision in *Turner Broadcasting System v. FCC*, 62 USLW 4647 (June 27, 1994). Congress has found that the so-called "explosion" in new media is largely a fallacy because of the cable industry's monopoly over its systems and programming. 1992 Cable Act §§2(a)(4)-(5).[9] Congress also determined that such new technolo-

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[9]Those findings state:

"(4) The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers.

(5) The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated

gies as do exist, including cable, do not replace over-the-air broadcasting as "an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate." 1992 Cable Act §2(a)(11). *See* MAP Comments at 9.

The Supreme Court in *Turner* similarly recognized the role of over-the-air-broadcasting as the primary real-time, day-to-day, minute-to-minute source of information on local and other issues of public importance:

> [T]he importance of local broadcasting outlets "can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population."...The interest in maintaining the local broadcasting structure does not evaporate simply because cable has come upon the scene. Although cable and other technologies have ushered in alternatives to broadcast television, nearly 40 percent of American households still rely on broadcast stations as their exclusive source of television programming.

Turner, supra at 4658 quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968). [Citations omitted.]

Within the realm of broadcasting, it is clear that ABC, CBS and NBC continue to dominate. MAP Comments at 10. Fox may have made some inroads to that power, but it comes nowhere near the more established networks in experience, resources, or viewership.[10] Network strength has increased with the depletion of FISR, and will increase further when the final FISR

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cable operators and programming distributors using other technologies."

[10]During the period from September 20, 1993 to January 9, 1994, the most popular Fox program, "The Simpsons", ranked just 37th (11.8/19) behind programming offered by ABC, CBS and NBC offerings. This pattern persists well into the summer season. For the week of June 27, to July 3, 1994, the most popular Fox program was the highly-touted debut episode of *Models, Inc.* The Fox program ranked 33rd behind competing programs offered by the three traditional networks (including many of their summer repeats). Source: Based on A.C. Nielsen data presented in *Electronic Media*, January 17, 1994 at 104; July 11, 1994 at 26.

restrictions are lifted in 1995.

To the extent that some Commenters speculate that a possible fifth and sixth network could further diminish that domination, *e.g.*, Coalition Comments at 12, it is enough to remind them that those networks do not yet exist, and may never emerge. The better question for the FCC is whether those new competitors will be more likely to get off the ground with or without PTAR. Experience (in the form of the Fox network) proves that PTAR is an adjunct to such new entry. *See* MAP Comments at 12.[11] To say that fifth and sixth networks could impinge on network power is akin to saying in the early 1980's that AM stereo would threaten FM dominance. Even if these networks do emerge, like the Fox network, they will not be fully competitive with the three major networks for years, if ever.

IV. That the Off-Network Restriction May Favor Fox is not a Reason to Eliminate the Rule.

As MAP predicted in its initial comments, a number of PTAR's opponents argue that Fox's exemption from the off-network rule, coupled with its recent acquisition of a number of new VHF affiliates in major cities, somehow puts the three original networks at a disadvantage which now warrants elimination of the rule. MAP Comments at 8 n.8. *See, e.g.*, Coalition Comments at 15-18; Network Affiliated Stations Alliance Comments at 3; Group W Comments at 2-4.

But eliminating the rule solely because it has worked in Fox's case, is illogical. If, indeed, the three major networks are now at a disadvantage *vis a vis* Fox because of its exemp-

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[11]Without the off-network rule, independent stations will lose the benefit of the exclusive use of off-network fare during the access hour. They will thus be unable to gain the revenue base necessary to form the core of another network. *Id.*

tion, the logical solution is for the Commission to reconsider whether such exemption is warranted. *See* MAP Comments at 8 n.8. That question is beyond the scope of this particular proceeding.

As MAP noted in its comments, it is ironic that the major networks and their affiliates want to "level the playing field" only when *they* perceive themselves as disadvantaged. *See* MAP Comments *Id*. Thus, while the elimination of the off-network rule may remove the disparity they have *vis a vis* Fox, it would be at the expense of handicapping the independent stations, which are far more deserving of FCC assistance.

V. The Coalition's Economic Claims are Unjustified and Self Serving.

A good deal of the Coalition's comments center around the putative economic effect the off-network rule has on off-network and first run syndicated programming. The Coalition argues that the rule not only drives up the price of first-run programming, but it also "lowers the price of off-network programming to independent stations, resulting in an unjustifiable subsidy to independent stations." Coalition Comments at 8. It also claims that this depression of off-network prices negatively affects the quality of network programming to the detriment of the public. *Id.*

These arguments must been seen for what they really are - self serving attempts by members of the Coalition to reap the maximum profitability from their programming. If the off-network rule is repealed, producers of off-network fare, including Disney and others, will simply make more money, because affiliates will be able to bid up the price of their programming. But the public would be worse off to the extent that independent stations are unable to keep up with the bidding, and they will lose the core programming that has attracted new audiences and new

revenues with which to purchase new first-run and other programming.

A. Rise in Cost Of First-Run Syndicated Programming.

The Coalition contends that the off-network rule "puts the price of popular first-run programming beyond the reach of independent stations," and "consequently the programming choice of independent stations is impaired." Coalition at 21-22.

To be candid, MAP questions the sincerity of this claimed concern that affiliates might out-bid independent stations for first-run programming. But, for the reasons discussed at p. 8 *supra*, the independent stations in the top 50 markets have shown no interest in that programming. Rather, what these stations want is familiar and popular off-network fare for the access period. The off-network rule removes the competition from network affiliates for such programming. That is why the independent stations are fighting vigorously to retain the rule. *See generally*, INTV Comments.

Nor is it to the benefit of first-run syndicators to have their programming on independent stations during the access hour. As explained at p. 6, *supra*, to have any chance for success, first-run programs must have exclusive access to the large audiences that only key network affiliates can guarantee during the access hour. This is because, in contrast to off-network programming with its built-in audience, first-run programming must prove itself from the beginning. Independent stations simply do not have the audience size that will sustain a vital first-run market in access. *See* King World Comments at 13.[12]

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[12]The Coalition and CBS employ programming patterns in television markets 51-100 as an indicator that first-run programming "would continue to thrive in the absence of the off-network restriction." Coalition Comments at 24; *see* CBS Comments at 10. The Coalition demonstrates that even though affiliates are not subject to the off-network restriction in those markets, 69% of their access slots contain first-run programming. Coalition Comments at 24.

B. Reduction in Cost of Off-Network Programming.

The Coalition claims that syndicators of network fare are "squeezed" because the "decline" in the number of video outlets available for off-network fare has caused a "glut" in the supply of such programming. Coalition Comments at 10-14. The Coalition attributes this "decline," in part, to the off-network rule, which has the effect of removing affiliates from the off-network market for the access period. *Id.* at 10-11.[13] The resulting increased supply of programming, the Coalition claims, has depress[ed] the syndication value of off-network programming." *Id.* at 13.

But the real "squeeze" is caused by the contradiction in which the Coalition is caught. It asserts that the massive explosion in video outlets render PTAR unnecessary, Coalition Comments at 5, yet argues at the same time that a *decline* in video outlets prevents off-network

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But programming practices in the second fifty markets are not a reliable indicator of what would happen in the first fifty. Factors like audience size, number of channels and other marketplace dynamics are dramatically different in these two market groups.

First, and foremost, stations in the second fifty markets do not pick first-run programming in a vacuum - they do so only after it has proved successful in the top 50 markets. First-run syndicators must gain access to at least 70% of television homes to garner enough revenue to be successful. Since nearly 70% are covered by network affiliates in the top 50 markets (according to 1993-94 Arbitron data), first-run syndicators must sell to the top fifty markets first. Thus, it is only after enough top 50 markets are cleared that smaller markets even have the opportunity to purchase first-run fare, and they do so with the guarantee that it will be viewed first on the strongest stations in the largest markets.

Secondly, there are many fewer stations in smaller markets. This creates a very different dynamic between network affiliates and independent stations. Since there are fewer bidders, competition for programming is not as keen as in larger markets. Thus, prices for programming are more affordable and independents can often compete more effectively with network affiliates (which are not as money-laden as their brethren in larger markets) both for off-network and first-run fare.

[13]The Coalition also attributes this diminution of the number of video outlets to independent stations going out of business, and the rise of the Fox network. *Id.* at 10-11,

syndicators from selling their product. *Id.* at 10-14.

The Coalition's double-speak suggests that their real purpose is strictly pecuniary gain. The affected Coalition members and other commenters can sell their programming to various video providers, including cable networks, satellites, independent stations and affiliates (as long as the off-network fare is not shown during access). As the Coalition readily admits, the real problem is that off-network syndicators cannot realize as much revenue from selling their programming to non-broadcast sources as they can if they sell it to a network affiliate for airing during access. *See id.* at 13-14.[14]

Whatever the reason for the alleged "glut," the Commission has no responsibility to ensure that all off-network fare is successful in syndication. Nor is there any guarantee that in the absence of the off-network rule that certain off-network fare would not find its way onto broadcast television during the access hour. The Coalition's illustration of the difficulty "Evening Shade" had in obtaining clearances is nothing more than one example of an off-network show that was simply not successful in syndication. This is nothing new - some shows that are successful in network prime time are not successful in syndication, and *vice versa*. The fact that broadcast stations had the choice to reject "Evening Shade" and purchase other programming, is evidence of the fact that the off-network rule has worked to bring a diversity of programming to the American people.

The Coalition complains that downward pressure on off-network pricing amounts to a subsidy for independent programmers. Coalition Comments at 8. But as discussed at p. 9, *supra*,

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[14]This admission demonstrates a recognition on the Coalition's part that over-the-air broadcasting is by far the most important source of information and entertainment for the American public. *See* discussion at p. 9-12, *supra*.

even if one assumes that PTAR did provide such a subsidy, this is not necessarily bad. In this case, the benefits of PTAR have fueled the growth of independent stations. This has in turn increased programming choices for the public. *Id.* Thus, contrary to the Coalition's assertion, any additional benefit to independent stations is completely "justifiable" because it redounds to the advantage of television viewers.

C. Reduction in Quality of Programming

The Coalition creates a parade of horribles to bolster its claims that the reduction in revenues resulting from the off-network rule leads to lower quality programming. Since networks pay producers only a fraction of their production costs for the initial network run, producers must rely on revenues from selling rerun rights to individual stations in the domestic market to cover their production losses and to generate capital for higher quality programming in the future. By removing the network affiliates from the mix of stations that can program these reruns during access time, the Coalition asserts, producers are prevented from selling their wares to "the most-established stations with the largest potential audiences, which can, therefore, offer the highest prices." Coalition Comments at 10. This inability to maximize profits, the Coalition argues, inevitably leads producers to produce lower cost, lower quality programming. Coalition Comments at 14. In addition, the Coalition asserts, the producers' inability to realize maximum gain will cause them to increase the license fees which they charge networks to help pay production costs. If producers increase license fees, the Coalition reasons, the networks themselves will have less money with which they can produce higher cost, higher quality programming. *Id.*[15]

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[15]The Coalition states that "[e]vidence of this trend can already be seen in the proliferation of lower priced programming that has appeared on network schedules in recent years, including news magazines and 'reality based' programming such as Rescue 911." *Id.* at 14 n.54.

Aside from the question of the appropriateness of the content-based judgments that this argument raises, *see* footnote 7, *supra*, it takes a great leap of faith to believe that the quality of programming on network television rises and falls based on the access of off-network fare to affiliates for one half hour each day. Producers and broadcasters may maximize their profits for 23 and one-half hours each day, even, as the Coalition admits, when they are attempting to meet the FCC's public interest requirements.[16] For that one half hour, producers can still make a decent amount of money rather than a huge amount of money. Furthermore, to the extent that the networks are willing to pay only minimal license fees to producers, they have only themselves to blame if producers do not have the funding to risk producing "higher quality" programming.

VI. THE *TURNER* CASE STRENGTHENS THE CONSTITUTIONAL UNDERPINNINGS OF PTAR.

First Media stands alone in its assertion that PTAR is unconstitutional on the grounds that the Commission's decision in *Syracuse Peace Council* rejected spectrum scarcity as a valid basis for broadcast regulation. Its comments essentially rehash arguments made in its Petition for Declaratory Ruling.[17] MAP has exhaustively addressed those arguments in its comments. *See* MAP Comments at 16-25.

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[16]"[I]ndependent TV stations...like all commercial broadcasters...seek to maximize their audiences and thereby increase the revenue they earn from *all* programming aired, regardless of daypart or program type****Like other stations...independents air public-interest type programming when it makes financial sense to do so." Coalition Comments at 22-23.

[17]To the extent First Media presents anything new to the Commission, it has simply updated its figures on the number of alternative media outlets which it believes undermines the spectrum scarcity rationale. First Media Comments at 5-10. For the same reasons discussed at pp. 9-12, *supra*, these outlets do not replace over-the-air broadcasting as the number one source of information for the American public. Nor do they change the fact that broadcast spectrum is still scarce. *See* MAP Comments at 17-22.

The Supreme Court's recent decision in *Turner* conclusively slams the door on First Media's argument. *Turner* unequivocally reaffirms the basic principle, laid out in *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969), that trustee obligations imposed on broadcasters in exchange for the exclusive use of scarce broadcast spectrum are a constitutionally permissible form of regulation:

> The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium. As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum....The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters....In addition, the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations on broadcast licensees....As we said in *Red Lion*, "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."

Turner, 62 USLW at 4651. [Citations omitted].

In addition, the *Turner* Court sharply rejected the notion, critical to First Media's argument, that scarcity does not exist and that broadcast stations, cable networks and other technologies are fungible. *See* First Media Comments at 11. The Court stated

> cable television does not suffer from the inherent limitations that characterize the broadcast medium****In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.

Turner, 62 USLW at 4651. *See also* discussion at 11, *supra*.[18]

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[18]First Media asserts that "anyone with the economic means today can transmit television programming to a mass audience by another technology. Since those who hold broadcast licenses no longer control access, the First Amendment analysis traditionally applied to broadcasters is not longer valid....Just as access to publishing is physically unlimited, so too is access to video

Thus, were there any doubt that broadcasting can be regulated to ensure access to scarce public airwaves, the *Turner* decision has now resolved it definitively.[19] Therefore, the various

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transmission." First Media Comments at 14. But, as discussed at 10, *supra*, Congress found that the monopoly cable bottleneck has *restricted* access to video outlets and prevented the deployment of newly-available technologies. The *Turner* Court also recognized cable's monopoly. *Turner*, 62 USLW at 4656. ("[S]imply by virtue of its ownership of the essential pathway...a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator...can thus silence the voice of competing speakers with a mere flick of the switch.")

[19]First Media argues that the Supreme Court's decision in *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990) does not "reaffirm the constitutionality of regulations based on spectrum scarcity." First Media Comments at 14. Because the Court "did not purport...to make its own independent finding of spectrum scarcity...." and "the current state of spectrum scarcity (as found by the Commission in *Syracuse*) was not at issue," First Media argues that "*Metro* cannot be read as resolving, or even addressing, the issue of whether content-based regulation can constitutionally survive the *Syracuse* findings." *Id.* at 14-15.

This argument rests on First Media's continuing fantasy that an agency ruling trumps a Supreme Court decision. No court has accepted the *Syracuse Peace Council* decision or the *1985 Fairness Report* findings on spectrum scarcity before, or after, the numerous rejections of the Commission's findings by the relevant House and Senate Committees in 1987, 1989 (in reports on fairness doctrine legislation) and 1990 (in reports on the Children's Television Act of 1990, Public Law 101-437, *codified at* 47 U.S.C. §303a). *See* MAP Comments at 18-25. Those Congressional considerations of *Syracuse* and the *1985 Fairness Report* included specific findings rejecting the Commission's conclusions. The *Metro* decision, which post-dated *Syracuse*, accurately stated the law as it was then and it is now - that broadcasters may be subject to certain content based and non-content based obligations because of the scarcity of spectrum.

Whatever doubts may be raised by First Media's skewed reading of *Metro* must be laid to rest by the Court's decision in *Turner*. The Court in *Turner* was directly confronted with the question of whether to regulate cable television as it has traditionally regulated broadcasting. In declining to do so, the Court reaffirmed that the scarcity rationale was still valid, and that such scarcity permitted the government "to place limited content restraints, and impose certain affirmative obligations on broadcast licensees...." *Turner*, 62 USLW at 4651. (This is not to concede First Media's argument that PTAR is a content-based restriction; indeed, under the standard laid out in *Turner*, it is most definitively content-neutral). Finally, while it recognized that "courts and commentators have criticized the scarcity rationale since its inception," the *Turner* Court stated that "we have declined to question its continuing validity as support for our broadcast jurisprudence....and see no reason to do so here." *Id.* A more direct reaffirmation of the trustee concept of broadcast regulation would be difficult to find.

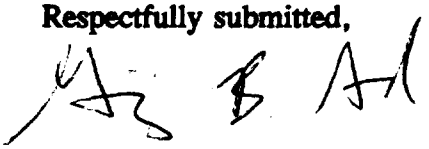
cases that uphold the constitutionality of PTAR on this basis also remain constitutionally sound. *E.g., Mount Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971); *NAITP v. FCC*, 516 F.2d 526 (2d Cir. 1975).

CONCLUSION

PTAR's opponents have not met their burden of showing why any reexamination of PTAR would be in the public interest. PTAR has worked, and continues to work, to the benefit of television viewers across the United States.

The newly decided *Turner* case only strengthens the legal underpinnings of PTAR. That case not only reaffirmed the constitutional basis upon which regulations like PTAR are premised, but also emphasizes the importance and necessity of content-neutral government regulation which increases diversity of voices and information on the electronic media.

Respectfully submitted,



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